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IN THE

Supreme Court of the United States

October Term, 1977.

STATE OF NEW YORK,

Petitioner,

v.

WILLIAM ABRUZZI,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

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STATE OF NEW YORK,

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WILLIAM ABRUZZI,

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Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

The District Attorney of Dutchess County, New York, on behalf of the People of the State of New York, petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York in the above-captioned case.

Opinions Below.

The opinion of the Court of Appeals of the State of New York (App. A, *infra*) is reported at 42 N. Y. 2d 813, N. E. 2d , N. Y. S. 2d . The opinion of the New York State Supreme Court, Appellate Division, Second Judicial Department (App. B, *infra*), is reported at 52 A. D. 2d 499, 385 N. Y. S. 2d 94.

Jurisdiction.

The judgment of the Court of Appeals of the State of New York was entered on May 12, 1977. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

Questions Presented.

1. In the absence of a warrant, where police embark on an investigation using a female undercover officer and the only means for providing for her safety is by visual observations, is it permissible within the confines of the Fourth Amendment of the United States Constitution to station a backup officer on privately owned property in a position to observe the undercover officer?

2. Does the Fourth Amendment of the United States Constitution require suppression of evidence of a crime committed in a police officer's plain view while he is on privately owned property, without a warrant, visually observing an undercover officer who is on the premises as a business invitee of the potential defendant?

3. Is there a violation of a physician's Fourth Amendment's protection of individual privacy where unknown to him, his patient, an undercover police officer, has consented to have another police officer viewing her examination by the physician?

4. Does an individual have a reasonable expectation of privacy, protected by the Fourth Amendment, when he is committing a crime such as rape or sodomy upon the body of another person?

5. Assuming, *arguendo,* that the police officer's presence on privately owned property is unjustified, does the exclusionary rule require suppression of evidence of an independent crime (e. g., rape and sodomy) committed in the presence of police officer who was not there to gain evidence against the defendant or to otherwise exploit any illegality, but who unarguably observed the crimes wholly unexpectedly, unpredictably and inadvertently.

Constitutional Provisions Involved.

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The pertinent portion of the Fourteenth Amendment of the United States constitution states: "• • • nor shall any State deprive any person of life, liberty, or property, without due process of law • • •"

Statement.

The respondent is a physician with a general practice who formerly practiced medicine in Wappingers Falls, Dutchess County, New York. The District Attorney of Dutchess County and the New York State Police received complaints from female patients of the respondent doctor that, during the course of purported medical treatment, they had been raped and sexually abused. During the last week in January, 1974, two female New York City police officers were assigned to Dutchess County to assist the District Attorney and the New York State Police in their investigation of various complaints of rape and sexual abuse committed by Dr. William Abruzzi against his patients.

The previous complaints had recited a similar pattern of events. The patient would enter the respondent doctor's examining room, with either a gynecological complaint or with a complaint of another physical ailment

(e. g., a rash on the neck) (A62). Whether the complaint to the doctor was gynecological or not, Abruzzi would inform the patient that an internal examination was necessary, and would tell the patient to undress and lie down on the examining table with her feet in the stirrups.

During the "examination," Abruzzi would repeatedly tell the patient to "relax" and think about other things and to "move" to assist in the application of "medicine." The female patients felt penetration of what they assumed to be medical instruments, and, when the women felt sexually aroused during the "treatment," the respondent doctor would allay their fears or suspicions by telling them that this treatment was the only way they could be helped (A62-63). One complainant stated that the respondent doctor inserted "medication" inside her, which had a numbing or painkilling effect. While each of the victims felt embarrassed and had misgivings during the "treatment," it was only after they left the office that they finally and fully realized that they had been the victims of a sexual assault. One of the victims went to her own gynecologist shortly after she left Abruzzi's office and the gynecologist confirmed the presence of sperm, although the woman had not knowingly had intercourse for the preceding five days.

When the New York City Police Department's female officers were assigned to Dutchess County, it was decided that the investigation would begin by having one of them, Peggy Hopkins, first proceed to the doctor's office in Dutchess County posing as a patient, for the purpose of "enter [ing] and survey [ing] the inner officers in order to further an investigation in connection with alleged sexual molesting by Dr. William Abruzzi, as reported to State Police authorities and the District Attorney" (A52-53).

When Officer Peggy Hopkins entered the examining room, New York State Police Investigator James Apolinaro climbed a ladder outside the examining room so that he could look through a window and observe Officer Hopkins. While observing Officer Hopkins, Investigator Apolinario also observed the respondent doctor in an adjacent room, committing three acts of sexual intercourse and two acts of sodomy (his mouth to her vagina), upon an unconscious patient, later identified as Patricia Dowd.

Thereafter, the respondent doctor was indicted for sodomizing and raping his patient, Patricia Dowd (under gas), and sexually abusing two others, twenty-two and fifteen years of age.

Prior to trial the respondent doctor submitted an omnibus motion which, in part, sought suppression of any and all testimony of New York State Police Investigator James Apolinario as to his observations of the crimes of rape and sodomy committed on the unconscious Patricia Dowd on the ground that the investigator's observations constituted an illegal search and seizure in violation of the Fourth Amendment of the United States Constitution. The County Court of Dutchess County denied that motion finding that the need to protect Officer Peggy Hopkins justified the presence of Investigator Apolinario at the window. From that vantage point, the respondent doctor's commission of the crimes of rape and sodomy upon the unconscious patient were within the investigator's plain view (App. D, *infra*, p. 31). William Abruzzi then entered a plea of guilty to the crime of Sexual Abuse in the First Degree (New York State Penal Law Section 130.65) in satisfaction of all counts of the Indictment.

Thereafter, the respondent doctor appealed to the New York State Supreme Court, Appellate Division, Second Judicial Department, where the sole issue raised by William Abruzzi was whether the testimony of New York State Police Investigator Apolinario and any and all evidence flowing therefrom should have been suppressed (New York State Criminal Procedure Law Section 710-70, subdivision 2). A divided court found that the investigator's observations did constitute an unreasonable search and seizure in violation of the Fourth Amendment of the Constitution of the United States and held that his observations must be suppressed (App. B, *infra*, p. 14) The dissenting justices found that, although the investigator's observations constituted an illegal search in violation of the Fourth Amendment, the officer could testify about his observation of the independent crimes of rape and sodomy committed upon the unconscious patient since his observation of the commission of those crimes was unrelated to his purpose of protecting Officer Peggy Hopkins. The dissenters stated that the doctrine of fruit of the poisonous tree should not be applied here (App. B, *infra*, p. 21).

The majority of the New York State Court of Appeals affirmed the order of the Appellate Division suppressing the testimony of Investigator Apolinario on the opinion of Mr. Justice Rabin in the Appellate Division (App. A, *infra*). The dissenting judge agreed with the County Court Judge that the investigator's observations were lawfully made. Moreover, he stated that: "[T]he doctrine of the fruit of the poisonous tree should not be extended to include evidence of personal observation by a police officer of a crime committed in his presence" (App. A, *infra*).

Reasons For Granting the Writ.

I. This case presents a question of substantial practical importance in the administration of criminal justice concerning the methods by which police may protect their own undercover officers.

A. It is well settled that when a police officer, informant or agent, who has not revealed his true purpose or identity, is invited onto private premises, he may lawfully enter the premises.[1] Often the safety of the undercover officer can be insured in such situations by equipping the officer with a recording or transmitting device or by having him accompanied by a friend. However, there are circumstances where these forms of protection are insufficient. When a female undercover officer investigating complaints of rape and sexual abuse enters a physician's office seeking some form of medical treatment and knowing that she might be asked to disrobe, the use of a transmitting or recording device or a weapon becomes impractical. Also, because of the type of crime, there is no guarantee that a recording or transmitting device would effectively transmit a conversation and notify a backup team that the officer in the physician's offices was being subjected to a sexual attack. By telling the patient to "relax" and to close her eyes, to think about other things and "to move" to assist in the application of "medicine," the physician's conversations tend to disguise, rather than reveal, the commission of the crime.

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[1] *See e.g., United States v. White*, 401 U. S. 747 (1971) (informant posing as a drug purchaser); *Lewis v. United States*, 385 U. S. 206 (1966) (agent posing as a co-conspirator); *Lopez v. United States*, 373 U. S. 427 (1963) (agent posing as an acceptor of bribe).

In this situation where ears are ineffective to reveal the commission of the crime, visual observation is necessary to protect the inside undercover officer.

B. While visual observations may constitute an unlawful search, visual observations do not necessarily constitute a search or constitute an unreasonable search in violation of the Fourth Amendment. When a police officer posing as a patient enters a physician's offices, she can observe anything that is in open view. Likewise, where the purpose of having another backup officer observing her from the outside is to insure that she does not become the unwilling victim of the physician's assaults,[2] he is expected to observe only what the undercover officer herself can see. What is in plain view for her is then in plain view for him. As a result, neither officer is conducting a search.

C. In addition, in *Katz v. United States,* 389 U. S. 347 (1967), this Court ruled that the Fourth Amendment protections of individual privacy were not dependent upon property interests. The concept of constitutionally protected area does not provide an automatic solution to Fourth Amendment problems. The analysis must go further and depending on the circumstances, individuals may have no reasonable expectation of privacy even in their own offices. *Id.* at 351 and n. 9.

Whether a person has a reasonable expectation of privacy depends in part on what society recognizes as reasonable. According to the 1970 census, women constitute 51.14% of the population. It cannot be assumed that when a

[2]Of course, a police officer may take precautions to prevent unreasonable risk of harm to himself or to others. *See Terry v. Ohio,* 392 U. S. 1, 34 (1967) (Harlan, J., concurring); *United States v. Mangana,* 512 F. 2d 1169 (9th Cir. 1975).

member of the majority of our population enters a physician's office, she leaves her expectations of personal security at the door. The Fourth Amendment is not our society's self-destruct mechanism; it is not designed to allow individuals to commit sexual assaults on other individuals while preventing the police from affording any type of protection.

Finally, it is unreasonable to conclude that a person has a right of privacy, *i. e.,* a right to be left alone, when he is committing a crime on the body of another person.

While the facts of this case may seem bizarre, they only bring to light a recurring problem in our society, *viz.* that medical personnel, who occupy a particular position of trust and confidence, have chemical substances readily available to them and can, under the guise of purported medical treatment, render a patient unconscious and then subject the unknowing victim to a sexual assault. A similar situation arose in *Avery v. State,* 15 Md. App. 520, 292 A. 2d 728, *appeal dismissed and cert. den.* 410 U. S. 977 (1973). However, instead of sexually abusing his patients in his office, Dr. Avery did it while "treating" his "patient" in her home. Also in *People v. Teicher,* N.Y.L.J. 6-13-77, page 12, columns 2-6 (N. Y. Co. Sup. Ct.), the defendant dentist was accused of sexually abusing his patients after he had anesthetized them. Teicher's office had no windows which afforded a view in from the outside and the New York County District Attorney's Office obtained a warrant, in the nature of an eavesdropping authorization, allowing videotaping of the defendant's conduct with consenting patients.[3]

[3]The District Attorney of New York County had to resort to surveillance by electronic means since he could not station a human being in a position to protect his informants and undercover officers. *See* 18 U.S.C. §2518(3) (c); New York State Criminal Procedure Law §700.15(4).

Although the issues in *Avery* and *Teicher* differ slightly from those raised in this case, the facts of those cases reveal that this type of conduct is not limited to the instant case. In view of the recurring problem and the serious nature of the crimes committed, there is a need for standards developed by this Court to guide police and prosecutors who will be faced with similar investigations in the future.

II. This case also involves a question of whether the exclusionary rule should even be applied to these facts. The exclusionary rule is designed to discourage unreasonable searches and seizures. Since the investigator's observations of the crimes are direct and probative evidence of the respondent's commission of the crimes of rape and sodomy upon his unconscious patient, the evidence should not be excluded unless there is some legitimate reason for such suppression. Deterrence of unlawful conduct by law enforcement officials has generally been acknowledged as some justification, but where application of the exclusionary rule can have no deterrent effect, the evidence should not be suppressed. *Brown v. Illinois,* 422 U. S. 184 (1975). Where the police have no advance knowledge that the crime is about to be committed, where police have no advance knowledge of the specific location of the evidence of the uncommitted crime and the police are not acting with the intent to seize evidence of the uncommitted crime, suppression serves the sole purpose of allowing a guilty physician to go free while giving no correlative benefit to society. The investigator's purpose of protecting the female undercover officer was totally unrelated to his observation of the crimes of rape and sodomy committed upon another woman. The investigator never expected to observe the respondent committing one of his sexual assaults on anyone other than perhaps the undercover officer.

Moreover, the decision of the New York State Court of Appeals requiring exclusion of evidence of the independent crime committed in the police officer's presence presents a clear conflict in the application of the exclusionary rule which ought to be resolved by this Court. In *State v. Miller,* 282 N. C. 633, 194 F. E. 2d 353 (1973), the court found that although the police officers entered premises with an invalid search warrant, the police officers could testify about the shooting of a fellow officer by defendant Miller.[4] Also, in *United States v. Troop,* 235 F. 2d 123 (7th Cir. 1956), where a federal agent entered an apartment to execute a search warrant and the defendant offered to bribe the agent, the Court found that the evidence of the independent crime of bribery was admissible even though the search warrant was later quashed and the evidence seized pursuant to it was suppressed. Likewise, in *Vinyard v. United States,* 335 F. 2d 176 (8th Cir. 19), *cert. den.* 379 U. S. 930 (1964), the Court ruled that assuming, *arguendo,* the initial arrest of Vinyard was unlawful, the defendant could still be prosecuted for a subsequent bribery of the arresting officers.

This Court should take this opportunity to clarify the law and to resolve the conflict created by the decision of the New York State Court of Appeals.

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[4]In *People v. Jones,* 66 Mich. App. 223, 238 N. W. 2d 813 (1976), where police officers conducted an unauthorized search of a vehicle and discovered two pistols under the front seat, and it was later discovered through ballistics tests that one of the guns had been used in a robbery approximately nine months earlier, the Court found that the arresting officers could not have foreseen the causal sequence involved and police cannot be deterred by circumstances they cannot foresee. Therefore, the gun was properly admitted as evidence in the robbery prosecution.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

August, 1977.

Respectfully submitted,

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APPENDIX A.

Decision of the Court of Appeals of the State of New York (42 N. Y. 2d 813, N. E. 2d , N.Y.S. 2d).

Order affirmed on the opinion by Mr. Justice SAMUEL RABIN at the Appellate Division (52 AD2d 499).

Concur: Chief Judge BREITEL and Judges GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE. Judge JASEN dissents and votes to reverse in the following memorandum: I would reverse the order of the Appellate Division and reinstate the judgment of conviction for the crime of sexual abuse in the first degree for the reasons stated in the opinion by Judge JOSEPH JIUDICE of the Dutchess County Court. I also agree with so much of the dissenting opinion by Mr. Justice JAMES D. HOPKINS at the Appellate Division as states that the doctrine of the taint of the poisonous tree should not be extended to include evidence of the personal observation by a police officer of a crime committed in his presence.

APPENDIX B.

Decision of the New York State Supreme Court, Appellate Division, Second Judicial Department, 52 A. D. 2d 499, 385 N.Y.S. 2d 94.

RABIN, J. This is an appeal from a judgment of the County Court of Dutchess County, rendered December 8, 1975, convicting the defendant, upon his plea of guilty, of the crime of sexual abuse in the first degree, in full

satisfaction of an indictment which charged him with sodomy, rape and various degrees of sexual abuse. The appeal brings up for review, *inter alia*, the denial of the branch of defendant's motion which sought to suppress, on the ground of an illegal search and seizure, "any and all testimony" flowing from the observations of a New York State Police Investigator, made while on the defendant's property. For the reasons set forth below, we reverse the judgment, vacate the plea, grant the branch of the motion to suppress as above stated and remand the case to the County Court for further proceedings not inconsistent with the views expressed herein.

Over the course of a year and a half, several patients of the defendant, a doctor, made complaints to the District Attorney's office alleging sexual misconduct on the defendant's part during the course of regular gynecological examinations. Pursuant to these complaints an investigation was undertaken in which the defendant's office was visited by an undercover policewoman posing as a patient. Her purpose was to survey the inner offices while a police investigator entered the rear yard of the defendant's premises and stationed himself outside of the building in a position to view the policewoman as she entered one of the examination rooms. To obtain such a view the investigator was required to climb a seven-foot ladder and peer through the exposed portions of heavily curtained windows. The investigator stated in his affidavit that, while he was so positioned, he was able to observe the undercover policewoman, that he was able to observe another examining room in which a female was lying on an examination table and that he witnessed certain acts of sexual misconduct committed upon the female patient by the defendant. It is conceded that no search warrant was obtained by the police before undertaking the course of events described above.

After he was indicted, the defendant moved, *inter alia*, to suppress all evidence flowing from the police investigator's observations on the ground that they constituted a warrantless search by the police investigator, and were, therefore, unlawful. The County Court denied that branch of the motion, finding that the protection of the undercover policewoman from possible danger while inside the defendant's office justified the presence of the police investigator and that, since his presence was thus justified, his observations of criminal conduct were admissible as having occurred within the officer's plain view.[1] We reject such a conclusion and hold that the search as conducted was unlawful and that the testimony directly flowing therefrom must be suppressed.

We first note that whether the police have conducted a search within the meaning of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the area is one in which there is a reasonable expectation of freedom from governmental intrusion (*Katz v United States*, 389 US 347, 352). Undoubtedly, a doctor's office is such an area (*Mancusi v De Forte*, 392 US 364). Consequently, the failure by the police to obtain a search warrant before the police investigator's trespass onto the defendant's premises may not be lightly excused (see *Coolidge v New Hampshire*, 403 US 443, 454; *Chimel v California*, 395 US 752, 762). Thus, "the most basic constitutional rule in this area is that 'searches

[1]The County Court made its determination solely on papers. On appeal the defendant raises, as one of his arguments, the existence of gaps and inconsistencies in the record which would necessitate, if not a reversal of the conviction, at least a hearing on the suppression motion. In particular there is asserted a critical disparity in the time at which the investigator claimed he witnessed the undercover policewoman in the defendant's office and the time at which the undercover policewoman was supposed to have left the premises according to the defendant's office time records. However, because we find that the investigator's observations were unlawful, even under circumstances most favorable to the People, no hearing is necessary.

conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption • • • that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it'" (*Coolidge v New Hampshire, supra,* pp. 454-455). Those exceptions generally stem from the exigencies of law enforcement or involve situations in which compliance with the rule would be "mere ritual" (*Ker v California,* 374 US 23, 38-41).

We find on this record no exigencies of law enforcement which would justify the police investigator's initial entry without a warrant. Even assuming that the safety of the undercover policewoman required surveillance, the investigation which led to the police trespass was not sudden but stemmed from complaints as far back as a year and a half before the incident in question. The investigator's entry onto the defendant's premises was not incident to a lawful arrest (see *Chimel v California, supra*). The investigator was neither engaged in hot pursuit (see *Warden v Hayden,* 387 US 294) nor motivated by the need to prevent loss of evidence (see *Schmerber v California,* 384 US 757). Furthermore, to argue, as the People do, that the investigator's observations come within the "plain view" doctrine is to ignore the underlying presumption that the viewing officer had a right to be in a position to have had that view (see *Harris v United States,* 390 US 234). But having failed to obtain a warrant where no exigent circumstances were present, the investigator's position in the defendant's backyard was unlawful, thereby rendering his "plain view" constitutionally infirm.

The dissenters, however, are of the opinion that the observations of the police investigator of an independent crime, unrelated to his original purpose and not induced by his presence, are admissible. This raises the question "whether, granting the primary illegality, the evidence to which objection is made has been discovered by exploitation of that illegality or, instead by means sufficiently distinguishable to be free of the primary taint—whether the connection between the primary illegality and the evidence in question is so 'attenuated' as to dissipate the taint" (see *People v Mendez,* 28 NY2d 94, 97). This question must be answered in the negative.

We must keep in mind the rationales which require application of the exclusionary rule in the first place, those of "deterrence" and "judicial integrity".[2] Certainly not all evidence is "fruit of the poisonous tree" and therefore necessarily inadmissible, simply because it would not have come to light but for the illegal actions of the police (*Wong Sun v United States,* 371 US 471, 487-488). The taint of initial illegality may be purged by an intervening independent act which breaks the causal

[2]When called upon to evaluate the merits of an argument against suppression on the ground that deterrence of police conduct would not be achieved, Mr. Justice STEWART noted, in *Harrison v. United States* (392 US 219, 224, n 10), that "no empirical evidence on the deterrence issue is available. And '[s]ince as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled.' *Elkins v. United States,* 364 US 216, 218. But it is not deterrence alone that warrants the exclusion of evidence illegally obtained—it is 'the imperative of judicial integrity.' *Id.,* at 222." The Justice went on to note that exclusion of the illegally obtained evidence and testimony flowing therefrom "deprives the Government of nothing to which it has any lawful claim and creates no impediment to legitimate methods of investigating and prosecuting crime. On the contrary, the exclusion of evidence causally linked to the Government's illegal activity no more than restores the situation that would have prevailed if the Government had itself obeyed the law" (*Harrison v United States, supra,* p 224, n 10).

chain linking the illegality and the evidence in such a way that the evidence is not in fact obtained by "exploitation of that illegality." In applying these maxims to the appeal at bar, we hold that the independent act of the defendant in engaging in a course of criminal conduct not anticipated by the trespassing investigator, is outweighed by the severity of the constitutional violation inherent in the initial abuse of the defendant's reasonable expectation of privacy (cf. *Katz v United States, supra*). This kind of search conducted by the police investigator without a warrant, must be declared to be invalid in all respects. To grant suppression of the fruits of the search as to matters sought, but admit fruits of the search as to matters not sought, would do irreparable damage to the constitutional protections afforded by the Fourth Amendment. The prosecutorial benefits of such a serious constitutional violation as presented herein must be denied, and the "'imperative of judicial integrity'" demands that this court not be made "party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions" (*Terry v Ohio,* 392 US 1, 12, 13).

It should be noted that our decision today has neither the intention nor the practical effect of insulating defendants from evidence of criminal activity directed toward a trespassing police officer. In all cases cited by the dissent in support of its independent crime theory, the independent crime was directed toward the police officer himself. As to those kinds of crimes, the testimony of the police officer is undoubtedly admissible, for the Fourth Amendment is not a vehicle for license to commit crimes against or through the police, regardless of where such crimes occur. Rather, the Fourth Amendment demands that the State shall not benefit by the use of evidence unlawfully obtained.

Hopkins, Acting P. J. (dissenting). I dissent and vote to affirm. Even though the acts of the defendant were observed by the police investigator in the course of an illegal search, the acts constituted, in themselves, an independent crime concerning which the observations of the officer were legal evidence. The doctrine of the taint of the poisonous tree should not be extended to infect evidence of the personal observation by a police officer of a crime committed in his presence.

The analysis upon which I base this conclusion takes into account the following:

1. There was sufficient time for a search warrant to be obtained prior to the appontment of the policewoman with the defendant. I shall assume, also, that the evidence supporting the complaints of the two female patients was so tenuous that a search warrant could not have been legally issued.

2. The doctrine of the poisonous tree strikes down the evidence of observations made as the result of an illegal search, as well as tangible evidence seized as the result of an illegal search (cf. *State of Texas v Gonzales,* 388 F2d 145; *Whitley v United States,* 237 F2d 787; *Brock v United States,* 223 F2d 681; *People v Terrell,* 53 Misc 2d 32, affd 30 AD2d 644).

3. The record is insufficient to support a factual finding that the police investigator was engaged in the observation of the defendant's medical office in order to protect the policewoman from any attack which the defendant might make upon her. Nor is the decisional law clear that an intrusion, otherwise unlawful, becomes insulated from invalidity when it occurs for the protection of another police officer, as argued by the prosecution (cf. *Rodriquez v State,* 189 So 2d 656 [Fla], cert den *sub nom Suarez v Florida,* 389 US 848; *State v Keefe,* 13 Wash App 829).

4. The concept of privacy is linked with the Fourth Amendment, though the latter affords broader safeguards in certain instances (*Katz v United States,* 389 US 347, 350; cf. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn L Rev 349). The ancient definition of "'curtilage" should not be decisive in determining whether the Fourth Amendment has been violated.[1] Similarly, whether the invasion took place within a commercial building or a home should not be the test. The teaching of *Katz* is that what is sought to be preserved "as private, even in an area accessible to the public, may be constitutionally protected" (*Katz v United States, supra,* pp 351-352).[2]

5. Privacy undoubtedly attaches to a doctor's office. Both doctor and patient expect their transactions to be private (see, e.g., CPLR 4504; but, see 8 Wigmore, Evidence [McNaughton rev], §2380a, pp 829-832). Nevertheless, when the patient is the victim of a crime perpetrated by the doctor, the reason for the privacy is punctured and the shield of the privilege falls (8 Wigmore, Evidence [McNaughton rev], §2385).

6. It must constantly be borne in mind that the Fourth Amendment speaks in terms of "unreasonable searches and seizures" (US Const, 4th Amdt; see *United States v Minton,* 488 F2d 37, cert den 416 US 936; *Commonwealth v Hernley,* 216 Pa Super Ct 177; Ann 48 ALR 3d 1178).

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[1]The "open fields" principle was first enunciated in *Hester v United States* (265 US 57), and illustrated in later cases (*Giacona v United States,* 257 F2d 450; *United States v. Sterling,* 369 F2d 799; *Foster v United States,* 296 F2d 65). That principle does not appear viable after *Katz v United States (supra).*

[2]*Katz,* decided in 1967, was subsequent to *People v Sperber* (40 Misc. 2d 13 affd 15 NY2d 566) and *People v. Terrell (supra),* involving factual patterns somewhat like the instant case, but coming to varying conclusions, based apparently upon whether a dwelling or a store was the place invaded. However, the affirmance of *Terrell* (without opinion) followed *Katz.*

These considerations lead me to the conclusion that the police investigator unlawfully trespassed when he placed the ladder against the building and observed the defendant's assaults on his patient. The illegal invasion thus formed an unreasonable search, barred by the Fourth Amendment. I find no escape from this conclusion through the exception of exigency, because no one could foretell that a crime was to be committed. It was, indeed, fortuitous that the investigator saw the incident which became the subject of the indictment. Nor am I able to excuse the illegality by the need to protect the policewoman. If this exception were uniformly adopted, the exception would engulf the Amendment.

Nonetheless, I would not hold that the exclusionary rule under the poisonous tree doctrine precludes the evidence of the investigator's observations. Here, the search disclosed an independent crime—a crime committed in front of the investigator and having nothing at all to do with the circumstances which brought the investigator initially to the scene. The evidence, through the observation of an independent crime, has been determined not to be tainted by a prior illegal search (see *People v Munger,* 37 AD2d 950; *Vinyard v United States,* 335 F2d 176, cert. den 379 US 930; *United States v Troop,* 235 F2d 123; *State v Miller,* 282 NC 633).

In *Munger* a concededly illegal entry by police officers preceded a bribery offer and it was said that the police action did not ban the prosecution for the later crime. In *Miller* the defendant shot and killed an officer in a police party making a raid into a home in which gamblers were suspected to be operating. The raiding party was armed with an invalid search warrant and the Supreme Court of North Carolina held the entry to be illegal, but that, nevertheless, the application of the exclusionary rule in such a case would, in effect, give victims of illegal searches a license to assault and kill police officers so engaged.

The rule of *Munger* and *Miller* has even greater efficacy in defendant's case. In each of those cases, the illegal search was the incident out of which the subsequent crime (bribery, murder) was derived; not so here, because the crime observed was unconnected with the illegal search. The defendant, it is clear, was not aware that he was being observed, and the timing of his sexual assault happened merely to coincide with the duration of the investigator's presence outside the window. Thus, both *Munger* and *Miller* present harder factual grounds for the application of the rule.[3]

One more point I must discuss. It is surely anomalous that at the same time that the defendant raises the question of the suppression of evidence, the record also contains a full statement in specific detail by the defendant of his sexual conduct toward his patient taken as the necessary foundation for his plea of guilty to the crime of sexual abuse in the first degree. Thus, the claim takes on an unearthly aspect somewhat like the episode in the case referred to by Judge FRANKEL in his recent article (Frankel, The Adversary Judge, 54 Texas L Rev 465). In that case (*United States v Capra,* 37 F Supp 603, affd in part, revd in part 501 F2d 267, cert den 420 US 990), at the suppression hearing, three defendants charged with narcotics violations sought to bolster their standing to make the motion by testifying that they had packaged heroin and transported it into New York. After their motion had been denied, the defendants did not take the stand at the trial and their counsel defended them by attempting to show, through cross-examination of the prosecution's witnesses, that the defendants had nothing to do with the heroin. Perhaps these contradictions are desirable in a society in which we rightly lay stress on the values shielded by the Fourth Amendment, but they present dilemmas not easily explicable to the public.

The exclusionary rule plainly serves the purpose of deterring illegal police activity (*Mapp v Ohio,* 367 US 643, 646-650); that purpose is furthered by preventing the admission of evidence of past crimes. However, the objective of deterrence is not accomplished by closing the eyes and mouth of a police officer who sees a crime committed in his presence, even though he is there illegally. The Fourth Amendment is to be construed in tune with its announced commandment of reasonableness, and so it should be in this case (cf *People v Mitchell,* 39 NY2d 173).

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APPENDIX C.

Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

In the above entitled action, the above named William Abruzzi, defendant in this action, having appealed to this court from a judgment of the County Court, Dutchess County, rendered December 8, 1975, convicting him of sexual abuse in the first degree, upon his plea of guilty, and imposing sentence; the said appeal brings up for review (1) so much of an order of the same court, dated November 29, 1974, as denied the branch of defendant's motion which sought to suppress the testimony of a certain police investigator as to his observations on a certain date and (2) a further order of the same court, dated February 28, 1975, which, upon the People's motion to reargue a portion of the first order, modified that order by reserving decision on the branch of defendant's motion which sought to suppress nine "fictional" books; and the said appeal having been argued by Robert G. Morvillo, Esq., of counsel for the appellant and argued by

Jennifer L. VanTuyl, Esq., of counsel for the respondent, due deliberation having been had thereon; and upon Opinion by Rabin, J., and this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the order dated November 29, 1974 insofar as reviewed is hereby reversed, on the law, and the branch of defendant's motion which sought to suppress the testimony of the police investigator as to his observations is granted, and it is further

ORDERED that the order dated February 28, 1975 is hereby affirmed, and it is further

ORDERED that the judgment appealed from is hereby reversed, on the law, the plea is vacated and the case is hereby remanded to the County Court for further proceedings in accordance with the opinion of Rabin, J.

As to the facts, this court has assumed, for the purpose of this appeal, that Investigator Apolinário trespassed upon the defendant's property for the purpose of protecting Officer Hopkins, but has not passed upon that fact. The findings of fact are otherwise affirmed.

Martuscello and Margett, JJ., concur.

Hopkins, Acting P. J., and Cohalan, J., dissent and vote to affirm the orders insofar as reviewed and to affirm the judgment, in an opinion by Hopkins, Acting P. J., in which Cohalan, J., concurs.

APPENDIX D.

Decision of the County Court of Dutchess County*.

JIUDICE, J.:

The above named defendant was indicted by the Grand Jury of Dutchess County for the crimes of sodomy in the first degree, rape in the first degree, sexual abuse in the

*This is an unreported decision.

first degree and sexual abuse in the third degree, and now moves for various forms of relief.

The defendant, a licensed physician, is a general practitioner in the Village of Wappingers Falls and owns a building in a residential area in which he conducts his medical practice.

Sometime during the latter part of January, 1974, two New York City policewomen were specially assigned to assist the New York State Police and the District Attorney's office in this county in an investigation relating to various complaints received from patients of the defendant alleging sexual misconduct on his part.

Pursuant to this investigation and more particularly on the evening of January 30, 1974, one of the policewomen assigned to the investigation, namely, Officer Hopkins, went to the defendant's office in the Village of Wappingers Falls and, posing as a patient, entered the premises with the supposed purpose of surveying the offices and becoming acquainted with the general layout of the premises in preparation for subsequent investigation of the defendant's activities.

On the evening in question, while Officer Hopkins was inside the defendant's medical offices, the New York State Police Investigator, Officer Apolinario, entered the rear yard of the premises and stationed himself outside of the building in a position to view Officer Hopkins through a window as she entered one of the examination rooms. While in this position, Investigator Apolinario observed Officer Hopkins inside the medical offices and, through the same window, observed another examining room in which he saw a female lying on the examination table. Investigator Apolinario observed certain acts committed upon this female patient which acts are the subject matter of the current indictment.

On the basis of these observations, an application was made to this Court for two search warrants which were issued on January 30, 1974. One search warrant directed a search of the defendant's medical offices to seize certain medical instruments and medical records of a number of the defendant's patients. The second search warrant authorized the search of the above premises and the seizure of various personal property, books and other paraphernalia.

It further appears that before the defendant was arrested or taken into custody on January 31, 1974, one of the assistant district attorneys telephoned the defendant at his home and discussed with him certain allegations now contained in the present indictment and, admittedly, during the course of this discussion, did not inform him of the Miranda warnings, nor did she inform him that the conversation was being tape recorded. It appears that no warrant of arrest had been issued prior to the conversation, as aforesaid.

The defendant first moves pursuant to §710.20 of the Criminal Procedure Law to suppress as evidence any and all testimony of the New York State Police Investigator, Apolinario, as to his observations made on January 30, 1974, on the grounds the same constituted an illegal search and seizure in violation of the Fourth Amendment to the United State Constitution. He also moves to suppress as evidence all items seized from the defendant's office pursuant to the two search warrants issued by this Court on January 31, 1974, on the grounds said warrants were invalid being based upon illegally seized evidence. Defendant's counsel argues that the defendant's right to be secure against any unreasonable search or seizure has been violated and that the observations made by Investigator Apolinario clearly violated the scope of protection afforded the defendant under the Fourth Amendment and that even though the Fourth Amendment describes "houses", it has been held that the provisions of the amendment are applicable to business offices (*Mancusi v. DeForte,* 392 U. S. 639 (1968)).

He also argues that observations as well as physical seizure come within the scope of the Fourth Amendment protection (*Williams v. United States,* 263 F. 2d 487 (1959)).

Therefore, the basis of this portion of the defendant's motion to suppress is predicated upon the contention that the observations of Apolinario through the windows of the defendant's professional office constituted an improper search and seizure within the meaning of the Fourth Amendment and the argument is based upon the standards as set forth in *Coolige v. New Hampshire,* 403 U. S. 443 (1971).

Defendant's counsel cites a number of cases in which the courts have consistently held that visual searches and seizures similar to that involved in the present case have been condemned (*State of Texas v. Gonzales,* 388 F. 2d 145 (1968); *United States v. Resnick,* 445 F. 2d 1127 (1973); *United States v. Case,* 435 F. 2d 766 (1970); *People of the State of California v. Hurst,* 325 F. 2d 891 (1964)).

Based upon these cases and others cited by defendant's counsel, it is the contention that the observations were a violation of the defendant's right of privacy, in violation of the Fourth Amendment and in the instant case, the defendant and his patient, in seeking privacy, did not expect a police officer to be looking into a private office and they further allege the courts have consistently condemned so-called "peeping" investigations. In addition, they contend the investigator had no right to be on the defendant's premises and that this fact alone is sufficient to negate the subsequent search through the window. Besides the Fourth Amendment arguments, the point is made that observations of the police investigator should be suppressed as a violation of the physician-patient privilege.

In answer to this portion of the defendant's motion, the District Attorney claims the evidence seized pursuant to the search warrant was lawfully obtained and there

was no violation of the defendant's Fourth Amendment constitutional rights. The District Attorney does not appear to dispute the facts in this case, but presents the Court with a unique argument by stating that the facts presented to this Court in the application for the search warrant established that on the evening in question Investigator Apolinario was on the defendant's premises with the consent of Officer Hopkins for the sole purpose of observing her actions and assuring her safety. Accordingly, such action was legitimate and conducted in good faith. He intended no general search nor was he there to observe any other action except those of Officer Hopkins. In coming to this conclusion, the District Attorney develops the following points:

1. Officer Hopkins was lawfully on the premises even though posing as a patient (*United States v. White,* 401 U. S. 616 (1971); *Hoffa v. United States,* 385 U. S. 293 (1966); *People v. Lawry,* 43 M. 2d 1084 (1964)).

2. Officer Hopkins, while in the defendant's office, could have lawfully reported any conversation she had had with the defendant and could have consented to having another police officer hear that conversation through an electronic device (*United States v. Koska,* 443 F. 2d 1167 (1971); *People v. Gibson,* 23 N. Y. 2d 618 (1969)).

3. The District Attorney, in establishing the legitimate presence of Officer Hopkins in the defendant's premises, urges, based upon the foregoing cases, that the presence of Investigator Apolinario was lawful since Officer Hopkins had the authority to consent to his viewing her activities.

4. The district attorney urges that Officer Hopkins, while lawfully present in the defendant's office, was placing herself in a situation of possible danger and, therefore, exigent circumstances were created which justified not only the presence of Investigator Apolinario, but his viewing of the premises (*People v. Somas,* 68 M. 2d 450 (1972)).

5. Necessity, i. e., the protection of Officer Hopkins from possible danger, justified Apolinario's action and that danger to a fellow officer assisting in an investigation justified Apolinario's presence (*People v. Gallman,* 19 N. Y. 2d 389 (1967); *People v. Gatti,* 29 A. D. 2d 617 (1967); *People v. Wojchiechowski,* 31 A. D. 2d 658 (1968), aff'd. 28 N. Y. 2d 498; *People v. Gorton,* N.Y.L.J., 4-30-74, p. 16, col. 5).

Since his presence was for a lawful purpose, he had a right to make an observation of certain acts which were in "plain view". Objects or evidence which come within the plain view of an officer who has a right to be in a position to have that view are subject to search and seizure (*Harris v. United States,* 390 U. S. 234 (1968); *People v. Brosnan,* 32 N. Y. 2d 254 (1973); *People v. Ball,* 41 A. D. 2d 689 (1973)).

The "plain view" doctrine likewise applies where an observation is made as a result of an intrusion justified by exigent circumstances and an officer who is properly in a position does not have to "blind himself" from something which is in plain view merely because it was not connected to the purpose for which his original presence was intended (*People v. Somas, People v. Gallman, People v. Gatti, People v. Wojchiechowski, People v. Gorton, supra*).

6. Finally, Investigator Apolinario, after observing a crime committed in his presence, did not use the observation as a basis for a general search, but applied to the Court for a search warrant based upon a supporting affidavit containing the facts of the observations.

The Court has researched the issues raised and in reading the many reported cases realizes the courts have strictly limited exceptions justifying warrantless searches. The majority of the cases dealing with exigent circumstances, possible danger and the "plain view" doctrine have involved situations where there was imminent danger to a person or where a strong belief existed that

life was in peril or that a criminal act was about to take place. It is in situations such as these where the courts have allowed exceptions in the most drastic of instances, particularly where a factual showing of imminent danger of death or serious bodily harm has been made.

This Court recognizes and its research so discloses that no precedent case exists which would determine the exact issues raised by the unique set of facts presented to the Court herein.

The defendant's attorney argues that Officer Hopkins was not in danger when she was present in the defendant's office for the limited purpose "of becoming acquainted with the layout . . .", and he further argues that she could not have been in danger under these circumstances.

In this Court's opinion, this is the crux of the entire case. Here we have a situation where the police had received prior complaints of alleged sexual misconduct on the part of the defendant. It was for this reason that Officer Hopkins went to the defendant's office posing as a prospective patient of the defendant. When Officer Hopkins entered the defendant's office, she obviously knew of the complaints which had previously been made against the defendant, or she would not have been present in the first place. Therefore, it must be assumed Officer Hopkins was apprehensive during her presence on the premises for it was, in fact, possible she could have come in contact with the defendant and thereby exposed herself to the same type of misconduct as alleged in the previous complaints. While it is true the record is devoid of a showing that she was, in fact, exposed to any overt acts on the part of the defendant, it was the apprehension on the part of the female officer and the possibility that she could have been placed in a compromising position that created a situation of possible and imminent danger to her.

Certainly, even the possibility of sexual misconduct toward a female would create in her mind sufficient fear of possible danger or even the possibility that she could be subjected to unnatural acts would be, in this Court's opinion, sufficient to create an apprehensive state of mind. The fact that no acts were committed on Officer Hopkins is unimportant. It is the fact she exposed herself to possible sexual misconduct by the defendant that is controlling in this case and did create a situation of possible and imminent danger. To view the circumstances otherwise would defy common sense especially in view of the unique situation involved in this case.

In view of the foregoing, necessity, that is to say, the protection of Officer Hopkins from this possible danger, justified the presence of Investigator Apolinario. Carrying it one step further, the Court believes, once again, common sense dictates that observations made by the police officer of criminal acts being committed by the defendant in his plain view were proper. To hold otherwise would mean that every law enforcement officer who is in the same position as Investigator Apolinario would literally have to blindfold himself to illegal acts committed in his plain view. This is not logical nor would it be a practical application of the legal precedent in this area of law.

This is a unique factual situation; nevertheless, the Court believes because of its uniqueness it can reach no other conclusion than to hold Investigator Apolinario's observations proper. Accordingly, the Court denies the defendant's motion to suppress as evidence all testimony of Investigator Apolinario and further holds these observations were proper in support of an application for the subsequent search warrants. All evidence was legally seized pursuant to said warrants with the following exception:

The seizure by the State Police of nine fictional books pursuant to one of the search warrants violated the defendant's constitutional rights. The Court agrees with the defendant's counsel's reliance on *Stanley v. Georgia,* 394 U. S. 557 (1969), and particularly with the rationale of the Court in that case when it held that the First and Fourteenth Amendments prohibit making private possession of obscene material a criminal act. Accordingly, the Court directs these books be suppressed in evidence as inadmissible at the defendant's trial and the same be returned to the possession of the defendant.

The defendant next moves to suppress telephonic statements allegedly made by him to an assistant district attorney on the grounds he was not advised of his rights under Miranda, nor did the assistant district attorney advise the defendant that a warrant for his arrest had been issued, nor that the conversation was being tape recorded.

It appears that at some time during the early morning hours of January 31, 1974, a conversation was held on the telephone between an assistant district attorney and the defendant in which the defendant was questioned about the facts of this case. It is claimed that before the defendant was arrested or taken into custody, the assistant district attorney telephoned the defendant at his home and discussed the allegations contained in counts 1, 2 and 3 of the indictment as well as other facts. Interestingly enough, there is no claim by the defendant that during the conversation, as aforesaid, he had any contact with any police officer or was he aware of the presence of a police officer. The defendant argues that the fact the assistant district attorney did not advise him of his Miranda rights or of the fact that his arrest was imminent precludes the introduction into evidence of the contents of this telephonic communication.

The record discloses and the District Attorney admits that a conversation was held with the defendant and the record further indicates no arrest warrant was ever issued and the defendant was arrested without a warrant. Since the conversation took place prior to defendant's arrest, the custodial requirements of Miranda are not applicable. The defendant had not been taken into custody at the time of the conversation nor had he been deprived of his freedom in any way, nor had he been placed in a situation by the police wherein he could reasonably believe that his freedom of action was restricted. Accordingly, the defendant's argument in this regard is without merit in that the conversation was non-custodial (*People v. Rodney P.,* 21 N. Y. 2d 1 (1967)).

In support of his suppression motions, the defendant's counsel next argues that the observations of Investigator Apolinario constituted a gross violation of the physician-patient privilege. It is the defendant's contention the violation of that privilege took place at the very moment Apolinario looked into the examination room with one of the complaining witnesses present and at that time there had been no waiver of the privilege by the patient. The Court disagrees with this premise. The physician-patient privilege does not extend to a third-party and the purpose of privilege is to protect a patient, not the physician. Therefore, a patient may waive the privilege at any time (*People v. Al-Kanani,* 33 N. Y. 2d 260 (1974)).

Even assuming for the sake of argument that the privilege existed at the time the complaining witness was in the defendant's office and the privilege had not been waived by her at that time, the record discloses the complaining witness testified before the Grand Jury and executed an affidavit in support of the applications for the search warrants in this case. Accordingly, this Court believes a waiver was made by her at that time of the physician-patient privilege and no violation, therefore, existed.

The defendant next moves pursuant to §710.20 of the Criminal Procedure Law for an order suppressing as evidence all testimony of Patricia Dowd, one of the complaining witnesses and alleged victims of the crimes charged in the indictment on the ground her identity and testimony were derived as a result of illegally obtained evidence. In support thereof, the defendant's counsel urges that her identity became known only through an illegal observation which was made by Investigator Apolinario. In view of the fact the Court by this decision has determined the observations of Investigator Apolinario were proper, this question is moot.

The defendant next moves for a dismissal of the indictment and for inspection of the Grand Jury minutes on the grounds of illegally seized and insufficient evidence.

The Court determines there is reasonable cause to examine the evidence before the Grand Jury and, accordingly, the Court has read the minutes and finds there is sufficient legal evidence, unexplained and uncontradicted, to sustain the indictment (*People v. Howell,* 3 N. Y. 2d 672 (1958)). Accordingly, that portion of defendant's motion is denied.

The defendant next moves for an order pursuant to Criminal Procedure Law §200.20(3) severing the first three counts of the indictment from the fourth and fifth counts on the basis that each of the charges are not related to date, place and victim and that the crimes charged in the first three counts are felonies carrying a greater potential punishment than the crimes charged in counts four and five. The defendant also claims the acts charged are so separate, distinct and unrelated to each other that the evidence in one would have no bearing on the evidence in the other and would thereby tend to unduly prejudice him were all counts of the indictment tried together.

The Court is of the opinion the defendant's contention in this regard is without merit in that §200.20 of the Criminal Procedure Law clearly allows an indictment to set forth criminal transactions which are similar in nature and this section was enacted for the purpose of allowing an indictment and trial of a defendant for several similar acts without regard to the possible punishment or gravity thereof (*People v. Lombardi,* 20 N. Y. 2d 266 (1967); *People v. Hetherington,* 27 N. Y. 2d 242 (1970); *People v. McEnery,* 22 N. Y. 2d 942 (1968)).

Accordingly, this portion of defendant's motion is denied.

The defendant next moves pursuant to Criminal Procedure Law §240.20 for an order granting discovery and inspection of the following items:

He moves for statements made by the defendant, whether oral or written, whether exculpatory or inculpatory, made to a public servant. He also moves for any recordings or tapes of defendant's conversations made through the use of eavesdropping devices or recordings.

The District Attorney, in response to these demands, states the People are in possession of tape recorded statements made by the defendant to a public servant and consents to make these available to defendant and his counsel for examination and reproduction and the Court, therefore, so directs the same to be made available at a time to be mutually agreed upon by the defendant's counsel and the District Attorney's office.

In response to defendant's demands numbered 3 and 4, the assistant district attorney states in her answering affidavit that the People are in possession of no such recordings or tapes and that no application or orders exist. The Court, therefore, denies that portion of the defendant's motion, but directs that should the District Attorney come into possession of any such recordings or tapes, that he make the same available to defendant's counsel.

In response to the defendant's demand number 5 in which he requests copies of all scientific reports made in connection with this case, the assistant district attorney attaches to her answering affidavit a copy of scientific reports concerning tests of the examination table and certain other items seized in connection with the case and states there are no scientific reports relating to two of the alleged victims named in the indictment. The defendant is not entitled to any reports relating to examinations of parties not named as victims in the counts of the indictment.

In response to defendant's demand number 6, the Court does not believe this defendant is entitled to copies of photographs, papers, documents and other objects relating to the indictment. Not only has the defendant failed to show the materiality of the items he wishes to discover, but the Court believes, even while recognizing the generally libralized tendency to grant disclosure, a defendant is not entitled to have a District Attorney disclose his entire file in a criminal matter. In addition, the items requested in this demand are, in this Court's opinion, exempt property pursuant to Criminal Law §240.10(3). Accordingly, that portion of defendant's motion is denied.

The defendant, in item number 7, moves to examine various items seized under the search warrant which consists of several articles of personal property, records and assorted paraphernalia. The Court holds the defendant has failed to comply with Criminal Procedure Law §240.20(3) in that he has failed not only to show that discovery is material to the preparation of his defense, but he has failed to show the request to be reasonable. Accordingly, that portion of defendant's motion is denied.

Lastly, the defendant, in item number 8, seeks to discover all police reports pertaining to the investigation of the defendant's office on January 30, 1974, and all reports pertaining to the activities of the undercover

agent and the observations of the investigator on that date. The Court holds such material is exempt property pursuant to §240.10(3) of the Criminal Procedure Law and denies that portion of defendant's motion.

The defendant next moves pursuant to $200.90 of the Criminal Procedure Law for a bill of particulars. In response to items A, B, E, F, I, J, M, N, P and Q of the demand, the assistant district attorney, in her answering affidaivt, has adequately supplied the defendant with exact times, Addresses and locations where the crimes charged in the indictment allegedly occurred, and the Court determines these requests have been properly complied with.

In response to item C of the demand, the assistant district attorney, in her answering affidavit, defines "deviate sexual intercourse" with sufficient specificity to comply with defendant's request.

In response to items D, G, H and L of the demand, the Court holds the defendant is not entitled to these requests since they are matters of evidence and not the proper subject of a bill of Particulars (*People v. Spina,* 14 A. D. 2d 5050 (1961)).

In response to items K, O and R of the demand, the assistant district attorney, in her answering affidavit, defines with sufficient specificity the term "sexual conduct" as used in the indictment to comply with defendant's request and to set forth specific acts would, in this Court's opinion, be clearly a matter of evidence which is an improper subject for a bill of particulars (*People v. Spina, supra*).

In response to item S of the demand, the defendant clearly is not entitled to the names and addresses of the People's witnesses (*People v. Hvizd,* 70 M. 2d 654 (1972); *People v. Ricci,* 59 M. 2d 259 (1969)).

The foregoing is so ordered.

Supreme Court, U. S.
FILED
OCT 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-215

STATE OF NEW YORK,

Petitioner,

v.

WILLIAM ABRUZZI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals of the State of New York (Pet. App. A) is reported at 42 N.Y.2d 313. The opinion of the New York State Supreme Court, Appellate Division (Pet. App. B) is reported at 52 A.D.2d 499, 385 N.Y.Supp.2d 94. The decision of the County Court of Dutchess County (Pet. App. D) is not reported.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on May 12, 1977. The petition for writ of certiorari was filed on August 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

Whether police officers on their own initiative and without a warrant may enter on to private property and peep through heavily curtained windows into a room used by a physician for the examination of female patients?

Statement

On January 30, 1974, respondent, a licensed physician of the State of New York was conducting his private practice of medicine in an office building which he owned in Wappingers Falls, New York. On that evening, New York State police officer James Apolinario, without a search warrant, entered the backyard area of respondent's building, mounted a ladder which he had brought with him and began peeping into the heavily curtained windows of the doctor's physical examination rooms.

The police officer alleged that his purpose was to observe respondent's examination of an undercover policewoman in one of the examination rooms.* However, he

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*It should be noted that the trial court in denying respondent's motion to suppress refused to conduct an evidentiary hearing concerning the circumstances of the original warrantless surveillance. The court relied solely on the police officer's version of those events that was contained in a subsequent application for a warrant to search respondent's offices. Thus, even if the court were to accept all of petitioner's legal arguments, it would still be necessary to remand the case for an evidentiary hearing.

spent approximately 35 minutes peeping into an adjoining examination room where a female patient was lying on an examination table with her feet in stirrups and covered by a white cover. The police officer stated that during his 35 minute surveillance of this room, he saw respondent and the patient engage in a conversation which he could not hear, and thereafter respondent engaged in certain sexual acts with the patient.

On the basis of these observations, the police subsequently obtained a search warrant for respondent's offices, which was executed on January 31, 1974. On March 26, 1974, respondent was indicted on five counts charging violations of the sexual abuse provisions of the penal law of the State of New York. After unsuccessfully moving to suppress the evidence obtained during the warrantless surveillance of January 30, 1974, as well as the fruits of that illegal search, respondent pleaded guilty to one count of the indictment against him and was thereafter sentenced to an indeterminate term in prison of 0-5 years.

On appeal of the denial of respondent's motion to suppress the evidence against him, the Appellate Division, Second Department reversed, finding "no exigencies of law enforcement which would justify a police investigator's initial entry without a warrant." (Pet. App. B, p. 16). The Court of Appeals affirmed.

Argument

Although petitioner attempts to portray this case as raising significant issues concerning the right of the police to take reasonable efforts to protect undercover operatives, the real issue presented is whether the police can enter upon private property and peep into a physician's examination room without first obtaining a judicial warrant authorizing such conduct.

The very careful opinion of the Appellate Division, adopted by the New York Court of Appeals, does not in any way denigrate the importance of protecting undercover police officers. It holds simply that where, as here, "the investigation which lead to the police trespass was not sudden but stemmed from complaints as far back as a year and a half before the incident in question" (Pet. App. B, p. 16), the police were not justified in undertaking the search in question without first having obtained a judicial warrant.

The decision below is therefore totally consistent with the prior decisions of this Court. Indeed, only this year in *United States* v. *Chadwick,* Docket No. 75-1721, decided June 21, 1977, 21 Cr. L. Rep. 3169, this Court reaffirmed the basic principles that:

> "The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.' *Johnson* v. *United States,* 333 U.S. 10, 14 (1948)."

The petition itself demonstrates that insistence on a judicial warrant as a prerequisite to a visual surveillance of a doctor's examination room will not frustrate legitimate police efforts. On page 9 of the Petition, reference is made to the case of *People* v. *Teicher* (N.Y.L.J. of June 13, 1977, p. 12, New York County Sup. Court), in which the District Attorney of New York County obtained a warrant in order to gather evidence of the same type of conduct at issue here. Petitioner offers no excuse for the failure to obtain such a warrant here.

It is ironic that petitioner cites *Katz* v. *United States,* 389 U.S. 347 (1967) in an attempt to justify the warrantless surveillance of a physician's private examination

room (see Petition, p. 8). In *Katz* this Court rejected the argument that law enforcement officers had the right to conduct a reasonable electronic surveillance of a public telephone booth without a warrant stating:

> "It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end."

Finally, there is no merit to petitioner's argument that the decisions below are inconsistent with several cases holding that where police officers have illegally entered a premises, they may nonetheless testify concerning assaults to themselves or attempts to bribe them (Pet. App. B, p. 11). The Appellate Division expressly noted these decisions and found them inapplicable to the facts at issue, stating:

> "It should be noted that our decision today has neither the intention nor the practical effect of insulating defendants from evidence of criminal activity directed toward a trespassing police officer. In all cases cited by the dissent in support of its independent crime theory, the independent crime was directed

toward the police officer himself. As to those kinds of crimes, the testimony of the police officer is undoubtedly admissible, for the Fourth Amendment is not a vehicle for license to commit crimes against or through the police, regardless of where such crimes occur." (Pet. App. B, p. 18).

Obviously, an individual in the physical presence of a police officer illegally on the premises has no reasonable expectation of privacy when he attempts to bribe or assault that officer.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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